STATE OF MICHIGAN

COURT OF APPEALS

ELSIE M. EADE AND DONALD EADE,

Plaintiffs-Appellants,

v

NORTH CENTRAL FOOD SYSTEMS, INC,

Defendant-Appellee.

UNPUBLISHED
June 4, 1999

No. 206235
Gogebic Circuit Court
LC No. 96-000093 NI

Before: Whitbeck, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

Plaintiffs-appellants Elsie M. Eade and Donald Eade (the "Eades") appeal as of right the trial court's order granting the motion for summary disposition of defendant-appellee North Central Food Systems, Inc ("North Central") in this slip and fall case. We affirm.

I. Basic Facts And Procedural History

While on vacation in Ironwood in early October of 1995, the Eades stopped at a Hardees Restaurant, a restaurant owned by North Central. After they finished their breakfast, the Eades left the restaurant, with Donald Eade leaving first and waiting in the couple's van for Elsie Eade who began to cross the parking lot but who stepped on something[1] after taking a few steps and fell, face first, to the pavement.

The Eades claimed that several restaurant patrons witnessed the accident from the window, but neither party listed any of those patrons as potential witnesses, and none of the patrons' depositions were taken. Donald Eade did not see his wife fall, but did see her crossing the parking lot through the mirror on the driver's side of his van. He claimed that he saw her walking, and that she then disappeared.

After Elsie Eade was assisted into the Eades' van, the Eades traveled approximately one-half hour before stopping to purchase pain medication for Elsie Eade. Continuing their vacation, the Eades traveled on to Winnipeg where Elsie Eade saw a physician the next day. Six days after the fall, Donald Eade returned to Hardees while the Eades were on their way home and reported the incident to the

assistant manager, Walter Lauersdorf, Jr. Donald Eade showed Lauersdorf where the accident had taken place. Lauersdorf inspected the area and took two Polaroid photographs of the site. Lauersdorf later testified that he noticed no dangerous conditions in the parking lot. Upon returning home, Elsie Eade sought further treatment for her injuries. The accident allegedly resulted in a bruised chin, sprains to both thumbs and one wrist, a fractured arm, and a chipped ankle.

The Eades filed suit in late March, 1996, alleging that North Central had breached its duty to maintain the parking lot in a safe condition and that the breach was the proximate cause of Elsie Eade's injuries. Following discovery and unsuccessful mediation, defendant filed a motion for summary disposition in late May, 1997, pursuant to MCR 2.116(C)(10), emphasizing that the Eades had failed to offer any evidence of causation. The Eades claimed that a safety expert's affidavit, in which the expert attested that Elsie Eade's fall was a result of North Central's negligence, and the deposition testimony regarding the parking lot's disrepair created a genuine issue of fact. The trial court granted North Central's motion in late August, 1997, stating that there was no factual evidence supporting the Eades' assertion that the parking lot was in disrepair.

II. Standard Of Review

We review the grant of a summary disposition motion de novo, and in doing so, must consider the same evidence presented to the trial court. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). After considering all admissions, affidavits, depositions, pleadings and other documentary evidence in the light most favorable to the nonmoving party, we must determine whether there was factual support for the underlying claim. *Spiek v Dep't of* Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). Ultimately, the nonmoving party must prove that a genuine issue of material fact exists on which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

III. Analysis

A. The Basis For The Eades' Claim

The Eades claimed that North Central breached its duty to maintain its restaurant premises in a safe condition. They alleged that due to the poor condition of the parking lot, it is likely that Elsie Eade stepped on a stone or a piece of pavement, that is, a piece of deteriorating asphalt. Thus, the Eades claim, North Central's breach of duty caused Elsie Eade to fall and suffer injuries. It is well settled that storekeepers such as North Central owe a duty to customers to provide reasonably safe premises. *Shorkey v Great Atlantic & Pacific Tea Co*, 259 Mich 450, 452; 243 NW 257 (1932). Such duty includes a corresponding duty to protect customers from dangerous conditions that the storekeeper is *or should be* aware of. *Bertrand*, *supra* at 609.

B. Lauersdorf's Deposition Testimony

(1) *The Franchise Inspection Report*

The Eades support their claim of error with excerpts of Lauersdorf's deposition testimony. First, they theorize that a poor franchise inspection report conducted toward the end of the Lauersdorf's tenure could have been due to the poor maintenance of the building's exterior. However, Lauersdorf did not remember this being the case and no copy of the inspection report was provided to the trial court. The limited testimony regarding the alleged inspection report did not amount to evidence that the parking lot was in disrepair.

(2) *Frost Damage To The Parking Lot*

The Eades next point to evidence of extensive frost damage to the parking lot during the previous winter. As an initial matter, it is not entirely clear from the record whether this damage actually occurred *before* Elsie Eade's fall. Lauersdorf testified at his deposition that during "the last two years" there had been extensive damage to the parking lot, indicating that he was referring to 1995 and 1996.[2] Lauersdorf testified that winter frost had created holes in the parking lot up to three feet in diameter and at least one foot deep. The Eades concluded from this that the parking lot was in an unsafe condition in October when Elsie Eade fell. Lauersdorf testified that the holes were patched in the spring and that, as a rule, repairs were rarely needed during summer months. There was no evidence that the winter frost damage had not been repaired by October, 1995. Thus, the testimony regarding the frost damage did not establish that the parking lot was in disrepair.

(3) *Other Elements Of Disrepair*

The Eades allege further that Lauersdorf's deposition testimony suggested that the parking lot was in disrepair at the time of the accident. The trial court correctly noted that the deposition testimony relied upon was Lauersdorf's *interpretation* of what several photographic exhibits *appeared* to show. Lauersdorf testified that the photographs, which he took, appeared to show a rough or uneven surface. However, Lauersdorf did not testify that the parking lot was *actually* rough or uneven. When asked to speculate on the effect of the uneven pavement allegedly depicted in the photographs, Lauersdorf stated that the uneven surfaces, even if accurately depicted, would *not* pose a danger or hazard.

Lauersdorf also testified that on the day the accident was reported he inspected the area with Donald Eade and found nothing whatsoever wrong with the parking lot. Lauersdorf testified that there were no debris, cracks, potholes or uneven pavement, nothing to indicate a hazardous condition. Donald Eade did not contradict this testimony, and neither of the Eades could say that they saw anything on the day of the accident that indicated an unsafe condition. Further, Elsie Eade testified that she stepped on some foreign object – presumably a stone – not *into* something like a hole or crack. In essence, the Eades ask this Court to give them the benefit of the doubt and assume that evidence of the "horrifying condition of the parking lot" would lead a jury to the natural conclusion that Elsie Eade must have stepped on a piece of the deteriorating asphalt. This inference, however, would require at least some evidence that such an extreme condition existed at the time of the accident. We find no such evidence in the record.

C. *Balogh* and *Childress*

The Eades have brought several cases to our attention, but each can be distinguished. In *Balogh v Churchill Square Apartments*, unpublished opinion per curiam of the Court of Appeals, issued March 21, 1997 (Docket No. 188232),[3] this Court agreed that the plaintiff had presented a genuine issue of material fact even though the victim had died and was, therefore, unable to tell what happened. There were no witnesses to the accident, and only circumstantial evidence supported the plaintiff's theory. Unlike the present case, however, there was substantial evidence supporting the plaintiff's theory of a logical sequence of events leading to the victim's death. While other possible theories were acknowledged, the evidence clearly supported the plaintiff's theory rather than any of the alternative theories. *Id*.

Similarly, the facts in *Childress v Pepsi Cola Metropolitan Bottling Co, Inc*, unpublished opinion of the United States District Court for the Western District of Michigan, decided February 27, 1997 (Docket No. 1:96-cv-226), clearly supported *one* logical chain of events leading to the plaintiff's accident. The Eades theorize that an object broke away from the pavement, but the evidence does not support this theory. Rather, the evidence, even the Eades' own testimony, indicated that there was nothing whatsoever wrong with the parking lot.

D. The Safety Expert's Affidavit

The Eades also provided the lower court with a safety expert's affidavit. The expert's conclusions were based on an examination of the parking lot in 1997 (two years after the accident), an examination of photographs of the parking lot, and the deposition testimony on the record. The expert pointed out that if asphalt deteriorates, the rocks that it contains will break away, and therefore concluded that Elsie Eade must have fallen on deteriorating and rocky asphalt that she did not see because she was watching for traffic. As the trial court noted, this conclusion directly contradicts the testimony of witnesses – including the Eades– who observed the parking lot on the day and week of the accident. There was no evidence beyond speculation that there were any stones or broken pavement in the area of the fall.

E. The Open And Obvious Exception

The Eades ask this Court to conclude that the condition encountered was not an open and obvious danger and to find that the loose stones and uneven pavement were such subtle conditions that they could not have been expected to be noticed. The record contains no evidence of any loose stones in the area. Any evidence of uneven pavement was speculation based on what a photograph appeared to show.

F. Conclusion

We conclude that the Eades did not meet their burden. The evidence does not support a conclusion that the parking lot was in extreme disrepair, that there were stones or any other debris on the pavement, or even that Elsie Eade stepped on a stone or a piece of pavement. Any evidence

tending to show that the parking lot was in a state of disrepair was, at best, speculation. The proofs presented do not lead to the logical conclusion that a stone came loose from the deteriorating parking lot or that if one did, it was the stone that caused the fall. The Eades have failed to establish that a genuine issue of material fact existed that would preclude summary

disposition. Thus, we hold that the trial court did not err in granting North Central's motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck
/s/ Stephen J. Markman
/s/ Peter D. O'Connell

[1] In the Eades' complaint, Elsie Eade alleged that she stepped on "stones in a hole," and Donald Eade testified at his deposition that Elsie Eade told him it was a stone. At her deposition, however, Elsie Eade testified that she did not know what she stepped on:

Q: Okay. What did you fall over?

A: I stepped on something that twisted my ankle, a stone or a piece of pavement or something.

Q: Okay. Did the something move under your foot when you stepped in it?

A: Yup.

Q: Okay. And when you fell, did you look at what you had fallen over?

A: No.

Q: Okay. Were you able to identify what you had fallen over?

A: I wasn't in any condition to even consider that at the time.

* * *

Q: Okay. So even as of today, you have no knowledge what exactly it was that you fell over?

A: No. I only know I stepped on something and fell.

[2] Self-evidently, winters in the Upper Peninsula begin in one calendar year and end in the next. The deposition was taken in July 1997. Presumably, the previous two *winters* would have been 1995-1996 and 1996-1997. Since Elsie Eade was injured in October 1995, it may be that the major damage to which Lauersdorf referred may not have yet occurred. However, because this is unclear and the

standard requires that we review the evidence in a light most favorable to the Eades, we will assume for purposes of this opinion that the damage occurred in 1994-1995, the winter *before* the accident.

[3] Unpublished opinions are not binding on this Court. MCR 7.215(C)(1); *Watson v Bureau of State Lottery*, 224 Mich App 639, 648; 569 NW2d 878 (1997).